

NO: 18-7208

**In the
Supreme Court of the United States**

NICHOLAS MASLONKA,

Petitioner,

v.

NOAH NAGY,

Warden,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

FEDERAL DEFENDER OFFICE

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ARGUMENT

This Court should grant a writ of certiorari to address the Sixth Circuit's holding that there is a requirement that state action contribute to counsel's absence from a critical stage of the proceedings in order for there to be a constructive denial of the Sixth Amendment right to counsel under *Cronic v. United States*.

This Court has recognized that pre-trial plea negotiations are a critical stage of criminal proceedings. *Missouri v. Frye*, 132 S.Ct 1399 (2012) and *Lafler v. Cooper*, 132 S.Ct 1326 (2012). In this case, Mr. Maslonka's plea bargain required that he cooperate with federal authorities in a separate investigation. Respondent attempts to characterize that cooperation as collateral to Mr. Maslonka's case. However, his cooperation with federal authorities was at the core of the plea bargaining process in his state case and held significant and substantial consequences for Maslonka both at the plea stage and at sentencing. The district court concluded that this was a critical stage of the proceedings. The Sixth Circuit assumed without deciding that it was a critical stage "because his more favorable state plea offer hinged on that cooperation." Respondent, by arguing that Maslonka's cooperation was not a critical stage and, therefore, the Court should not consider his case, attacks a straw man. The question before the Court involves the Sixth Circuit's holding that state action is required before there can be a complete denial of counsel under *Cronic*. That holding was not limited to the plea negotiation or other pretrial stages of criminal proceedings. The Sixth Circuit "emphatically reject[ed] the theory that a counsel's mere physical absence from a critical stage of the proceeding based on counsel's own failure to be

present, rather than a denial by the state, can constitute a constructive denial of counsel under *Cronic*” and “. . . decline[d] to extend the *Cronic* complete denial exception to cases where a counsel is physically absent due to counsel’s own failure to be present, without any denial by the state.” It is this holding that Mr. Maslonka asks the Court to review.

Respondent argues that because counsel was physically present at each pre-trial hearing, the plea colloquy and sentencing, she participated in all of the critical stages of Maslonka’s case and therefore there can be no constructive denial of counsel. In doing so, Respondent overlooks this Court’s holdings in *Frye* and *Cooper* that plea negotiations are a critical stage as well. Maslonka’s trial counsel utterly failed to participate at that critical stage. In addition to not physically attending any of the meetings with federal authorities with her client, she never bothered to learn the nature of the cooperation, didn’t make any effort to define or limit the scope of the cooperation, never sought a cooperation agreement, never met with Maslonka to prepare him for the grand jury and made no efforts to rehabilitate him when the Assistant U.S. Attorney decided not to call him before the grand jury. She failed to assist Mr. Maslonka in his cooperation with the federal authorities, failed to consult with him regarding that cooperation, failed to provide him with advice, failed to protect his interests and failed to advocate on his behalf both with the prosecutor and with the court at sentencing. Her abdication of her role as counsel at this stage of the proceedings could not have been more complete.

By grafting a state action requirement on to her lack of participation to avoid a finding of the constructive denial of counsel, the Sixth Circuit created a split within the Circuits. Respondent attempts to characterize this split as “not mature” because in the thirty-five years since this Court’s decision in *Cronic* only one other Circuit has addressed the issue. The Fifth Circuit in *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) rejected a state action requirement for *Cronic* violations and no other Circuit has adopted one. In doing the opposite in this case, the Sixth Circuit has branched so far off of the mainstream as to warrant this Court’s review.

II. The Court Should Grant A Writ Of Certiorari Because The Circuit’s Limited Remand In This Case Amounts To A Suspension Of The Writ.

Respondent maintains that the Sixth Circuit by limiting the remand in this matter to Maslonka’s claims relating to ineffective assistance of appellate counsel has not suspend the writ of habeas corpus because he has no other claims that remain. This is simply not true. Mr. Maslonka’s petition raised claims that his right to due process was violated when he pleaded guilty without adequate notice so as to render his plea unknowing, involuntary and unintelligent. Memorandum in Support of Petition For Writ of Habeas Corpus at Page ID 264-354. These claims are independent of his ineffective assistance of counsel claims. The Sixth Circuit’s limited remand will result in these claims never being reviewed and amounts to a suspension of the writ.


CONCLUSION

The Petition should be granted and the decision of the Sixth Circuit reversed.

Respectfully Submitted,

**FEDERAL COMMUNITY DEFENDER
EASTERN DISTRICT OF MICHIGAN**

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